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Supreme Court, U.S.
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No. 99-829

In the Supreme Court of the United States

JAMES J. CERVANTES,

Petitioner,

v.

LARRY JONES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

NANCY G. LISCHER
Counsel of Record
STEVEN M. PUISZIS
CHARLES H. WAHTOLA
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
312-704-3000

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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QUESTIONS PRESENTED

Whether a §1983 action for malicious prosecution involving allegations of fabricated evidence and perjured testimony by a police officer may be maintained against that officer even though probable cause otherwise existed, the prosecutor unilaterally decided to initiate the prosecution based on information developed by five law enforcement agencies and did not consider the alleged fabricated evidence, and the officer was absolutely immune as a testifying witness?

Does a law enforcement officer lose his absolute immunity as a testifying witness merely by participating in a criminal investigation where a plaintiff claims the officer is a "complaining witness"?

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BRIEF IN OPPOSITION

Respondent Larry Jones respectfully requests this Court to deny the petition for a writ of certiorari which seeks review of the Seventh Circuit's decision.

OPINIONS BELOW

The Seventh Circuit's decision is reprinted in the appendix at A1-15 and is reported at 188 F.3d 805.[1] The district court's decision granting summary judgment is reprinted in the petitioner's appendix at A18-30 and is reported at 23 F.Supp.2d 885.

JURISDICTIONAL STATEMENT

The Seventh Circuit entered its decision on August 13, 1999. No rehearing was sought. The petitioner timely filed his petition for a writ of certiorari on November 12, 1999, which was docketed in this Court on November 15, 1999. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Unites States Constitution provides:

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[1] The decision in petitioner's appendix ("Pet.App.") is inaccurately reproduced because the text of two footnotes is included in the main text. The decision is therefore reproduced in the appendix to this brief ("App.").

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 (42 U.S.C. §1983) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner's statement of the case omits certain facts relevant to the lower court's ruling. The facts recited by the Seventh Circuit are correct, many of which may be found in the affidavit of John Barsanti, the assistant state's attorney who prosecuted petitioner, and the FBI profile report. Both the affidavit and profile report are reprinted in the appendix to this brief (App. A16-37). However, there are additional factual points which should be noted.

In the district court, the only evidence which the petitioner claimed was fabricated was a statement made as respondent drove petitioner home after failing to pass a polygraph examination (App. A26-28). Accord-

ing to both petitioner's and respondent's recollections, petitioner's statement was a hypothetical, *i.e.*, that "if" he admitted or confessed to the crime, then what "would be my defense?" Petitioner answered interrogatories stating that this was his sole claim of fabricated evidence, and repeated that this was the sole claim of fabricated evidence in opposing respondent's summary judgment motion, although he raised other points in an affidavit (Dkt.12, Exh.2; Dkt.19, pp.2, 11-12; Dkt.20, Exh.7). When asked "what evidence you claim the defendant Larry Jones fabricated," petitioner answered:

> ANSWER: The claim that I had made inculpatory statements. Specifically, that I had had (sic) asked Jones why I should confess, and that I had then stated that "If I admit I killed Sally, what would my defense be?" I never made this statement.

(Dkt.12, Exh.2). What petitioner said, according to his testimony at the hearing on his motion to suppress, was: "I told him if I confess to a crime that I did not commit, what would be my defense? I got too much to lose" (Dkt.12, Exh.4, Tr. 74-75).

On appeal in the Seventh Circuit, and again in this Court, petitioner expanded his litany of alleged misstatements to include three additional statements that he claims he did not say: that he may have lied about being at his mother's that day; that he had difficulties controlling his temper when he drinks; and that he was drinking beer and smoking marijuana the night of the murder (Pltf's 7th Cir. Br. 4-5; Pet. 3).

Petitioner's affidavit submitted in opposition to the summary judgment motion did not fully contradict these three alleged misstatements. He did not deny that he ever told respondent that he had difficulty con-

trolling his temper when he drank. Rather, Cervantes denied that he said this during a particular conversation which took place on December 8, 1992 (Pet. App.61). Cervantes' girlfriends and ex-wife confirmed to the police that Cervantes abused them when drinking (App. A23, A25, A26).

Cervantes' sole quarrel with respondent's testimony that petitioner told him that he had been drinking beer and smoking marijuana the night of the murder was not that he never said anything like that, but that he told respondent that he had been drinking and smoking marijuana in the afternoon, not the evening (Pet.App. 62). Finally, petitioner did not contradict that he told the police that he had gone to his mother's house the day before the murder, but contradicted that he told them he had visited his mother. According to petitioner, he told the police that he had not visited his mother, but went to her house and she did not see him because she was not home (Pet.App. 62). In his affidavit, the petitioner described these three discrepancies as "errors" (Pet.App. 62).

The respondent did not explicitly tell the grand jury that the petitioner confessed to the murder of Sally Lavergne. Respondent testified to a conversation he had with petitioner at 5:00 a.m. as he drove him home, and that he told petitioner that it seemed like he "would like to admit what you've done, get it out of the way, get the punishment that you deserve for doing it and get started with the rest of your life" (Pet.App. 50-51). He testified that petitioner responded: "[Y]es, I would like to do that," but "if" he admitted to the killing, "what would my defense be?" (Pet.App. 50-51).

John Barsanti, the assistant state's attorney who prosecuted petitioner, testified that he did not rely on this conversation in deciding to seek an indictment because he found it to be equivocal (App. A28).

It is not true that there was no physical evidence linking the petitioner to the apartment where the murder occurred, as petitioner claims and the Seventh Circuit noted (Pet. 1-2; App. A14). Petitioner had a key to the apartment, and there was no sign of forced entry (App. A19, A24). Respondent was trying to obtain additional physical evidence when Barsanti decided to seek an indictment without it. Respondent had gone to Barsanti, the assistant state's attorney, to seek a warrant for hair and blood samples from petitioner (App. A16). Barsanti independently reviewed the information developed thus far in the investigation (App. A17). It showed, among other things, that petitioner was the victim's former lover, and he matched the description of the person seen with the victim at a restaurant several days before her murder (App. A22, A24). After the meeting, the victim told the restaurant owner that her friend was mad at her because she told him that he could not use her apartment anymore (App. A22).

Barsanti testified that he unilaterally made the decision not to seek a warrant for further evidence because he decided that there was sufficient evidence to take the case to the grand jury (App. A16-17). Barsanti also testified that respondent did not request, pressure, urge or attempt to influence him in this decision (App. A17, A31).

The Seventh Circuit correctly noted that there were DNA tests which did not match with either the peti-

tioner or the victim. However, those tests were not conducted until after the indictment (Dkt.20, Exh.3). Thus, the results obviously could not have been known to the respondent when he testified in front of the grand jury.

The Seventh Circuit also noted that Judge Doyle found that an FBI agent had lied under oath at the suppression hearing (App. A12 n.8). It did not comment on the fact that the same judge, the sole judge who heard both the petitioner and respondent testify to the disputed conversation, made a specific finding that respondent's testimony was credible (Dkt.12, Exh.1(C) p.9).

Finally, it must be noted that no less than five law enforcement agencies were involved in some aspect of the investigation, including the FBI, the Illinois State Police, and the police departments of St. Charles, South Elgin (of which respondent was a member), and West Dundee (Dkt.12, Exh.1; App. A17-18, A23-24). Multiple officers, including the petitioner, were involved in the investigation and in interviewing the various witnesses (App. A17-27).

The prosecutor explained that he decided to subpoena the respondent because he was familiar with all aspects of the investigation, but he could have just as easily subpoenaed any one of the law enforcement officers from the various agencies involved (App. A28-29). Only this respondent was subpoenaed and testified before the grand jury. Only this respondent was sued by petitioner.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

PETITIONER'S QUESTION DOES NOT WARRANT REVIEW BY THIS COURT

Petitioner argues that he has a remedy regardless of whether he can establish the essential elements of his Fourth Amendment malicious prosecution claim, including lack of probable cause, because he claims that respondent, a law enforcement officer, fabricated evidence and falsely testified to his conversation. According to petitioner, once he claimed the respondent lied, this entitled him to recover, even if the prosecutor disregarded the disputed conversation and otherwise had probable cause to seek an indictment. This record does not provide factual support for petitioner's arguments. Moreover, the law is established in this area and this Court's review is not warranted.

A. This Record Does Not Support the Claim That Respondent's Alleged Fabricated Evidence Was the Basis of the Prosecutor's Decision to Seek an Indictment Before the Grand Jury.

It should first be noted that this record does not support the claim that respondent fabricated evidence or testified falsely to the grand jury. Neither petitioner's nor respondent's version could be reasonably understood to be an explicit confession, but only presented a hypothetical scenario that "if" (or "in the event") that petitioner confessed, then what would his defense be.

Respondent's alleged false testimony before the grand jury was that petitioner told him: "If I admit I killed [the victim], what would my defense be?" (Pet.App.51). Petitioner's version was: "I told him if I confess to a crime that I did not commit, what would be my defense? I got too much to lose" (Dkt.12, Exh.4, Tr. 74-75). That the conversation took place was never disputed by petitioner. That there were discrepancies in how the petitioner and respondent remembered this conversation, which took place at 5:00 a.m., does not make this statement "fabricated" or respondent's testimony as to his memory of the conversation "false."

Not surprisingly, the prosecutor who made the decision not to seek a warrant for physical evidence from petitioner (as the respondent asked), testified that he thought respondent's report of petitioner's statement was equivocal and he did not rely on it in deciding to seek an indictment (App. A28). Thus, any discrepancy between the two versions did not create a genuine issue of material fact given the fact that the prosecutor disregarded the disputed statement in deciding to go to the grand jury.

This case was decided on a summary judgment motion, and there is no evidence to contradict the prosecutor's affidavit that he, and only he, decided not to seek a warrant for additional evidence (as respondent requested), but to seek an indictment before the grand jury. The prosecutor testified that respondent never suggested, pressured, urged or attempted to influence his decision to seek an indictment (App. A17, A31). There is no evidence that the prosecutor relied on the petitioner's "equivocal" statement. It is not enough that allegedly false information was given; the prosecutor

must be influenced by that false information for it to be actionable. *Wilkes v. Young*, 28 F.3d 1362, 1365 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); W. Prosser, LAW OF TORTS, §119 at 837 (4th ed. 1971).

Liability under §1983 requires a causal connection between the alleged acts taken in violation of a plaintiff's rights and the harm. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 692 (1978) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). Here, there was no causal connection because the prosecutor alone decided to seek an indictment without considering the disputed statement.

B. Whether a Testifying Witness Is Absolutely Immune for His Testimony in a Judicial Proceeding Is a Settled Area of Law.

The question then becomes whether respondent is subject to liability for his grand jury testimony. Petitioner argues that simply because he claims respondent testified falsely, he has a right to recover under §1983 (Pet. 4). Yet, this Court has expressly held there is absolute immunity for a testifying witness, even if the alleged testimony is false or the witness commits perjury. *Burns v. Reed*, 500 U.S. 478, 489 (1991) (citing *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983)). Testifying witnesses are absolutely immune from liability under 42 U.S.C. §1983. *Briscoe*, 460 U.S. at 334-41.

The reason for according absolute immunity for testimony in a judicial proceeding is not out of deference for the public official. Rather, "the dictates of public policy which requires that the paths which lead to the ascertainment of truth should be left as free and unobstruct-

ed as possible." *Id.* at 332-33 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)). If witnesses were not absolutely immune, they would engage in self-censorship, shading their testimony in fear of liability, *Briscoe*, 460 U.S. at 333. "Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 500 U.S. 478, 494 (1991) (citing *Forrester v. White*, 484 U.S. 219, 226 (1988)). Police officers, just like lay witnesses, are absolutely immune for their testimony. *Briscoe*, 460 U.S. at 335-36. A particular concern arises with police officers because they testify in "scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses." *Briscoe*, 460 U.S. at 343-44 (quoted in *Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999).

It is now well established that this Court utilizes a "functional approach," in which a court looks to "the nature of the function performed, not the identity of the actor who performed it" to determine if there is immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester*, 484 U.S. at 229). *See generally Burns*, 500 U.S. at 486 (collecting cases). It is under this "functional approach" that respondent's role in this case must be examined. First, he was one of several officers from five law enforcement agencies who investigated the murder. There is no evidence that he instigated the prosecution. Rather, at the point the prosecutor unilaterally decided to take the case to the grand jury with the information developed to date, the respondent was seeking a warrant to obtain additional evidence. Respondent's second function was to testify in front of

the grand jury after the prosecutor decided to subpoena him of all the officers. Respondent is absolutely immune because he was sued for his grand jury testimony, regardless if it was false and regardless of the other hats he wore during the investigation.

This Court has clearly established that a functional test is to be utilized, *i.e.*, what was the function of the defendant when he purportedly violated the plaintiff's constitutional rights. *Burns*, 500 U.S. at 486 (collecting cases applying a functional approach); *Briscoe*, 460 U.S. at 342. *See also Kalina v. Fletcher*, 522 U.S. 118, 134-35 (1997) (Scalia, J., concurring). Here, respondent was a testifying witness before a judicial tribunal. A police officer who testifies at a judicial proceeding is, like all witnesses, absolutely immune, even if he commits perjury. *Briscoe*, 460 U.S. at 335-36.

In *Briscoe,* this Court held that law enforcement officers are absolutely immune from liability for their testimony at a criminal trial. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court confirmed that testifying witnesses are absolutely immune, although it rejected absolute immunity for an officer who allegedly perjured himself in a warrant application. It affirmed that it had "interpreted §1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process, . . . because any lesser degree of immunity could impair the judicial process itself." *Malley*, 475 U.S. at 342-43 (citing *Briscoe*, 460 U.S. at 334-35).

The question posed by the petitioner does not present an unresolved question nor does it warrant this Court's review. This Court squarely held in *Briscoe* that testify-

ing witnesses are absolutely immune from liability. It has reaffirmed *Briscoe* and recognized that testifying witnesses are absolutely immune "even if the witness knew the statements were false and made them with malice." *Burns*, 500 U.S. at 489 (citing *Briscoe*, 460 U.S. at 332).

This Court has examined the scope of absolute immunity under various factual scenarios. *Kalina v. Fletcher*, 522 U.S. 118 (1997) (holding that a prosecutor was absolutely immune for prosecutorial functions, but not immune where sued for investigative, non-prosecutorial functions); *Buckley*, 509 U.S. at 274, 278 (holding that a prosecutor does not perform a prosecutorial function and is not absolutely immune when he fabricates evidence or holds a press conference but would only be protected by qualified immunity); *Burns*, 500 U.S. at 487 (holding that a prosecutor is absolutely immune for appearing at a probable cause hearing as the lawyer for the State, but not absolutely immune for giving legal advice to the police because it is not so "intimately associated with the judicial phase of the criminal process," citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *Forrester*, 484 U.S. 219 (holding that although judges are absolutely immune when performing judicial duties, they are not absolutely immune when performing administrative tasks); *Malley*, 475 U.S. 335 (holding that a police officer whose request for a warrant resulted in an unconstitutional arrest because the affidavit failed to establish probable cause was not absolutely immune). This Court has provided sufficient guidance regarding the scope of absolute immunity.

C. This Court Has Held That There Is No Civil Remedy Where a Person Is Absolutely Immune and this Question Does Not Warrant this Court's Review.

Petitioner's question presented for review is whether a person is left without a remedy if a defendant presents false evidence to a grand jury. This Court has already (and repeatedly) answered this question. Not having a civil remedy is the necessary result when a person has absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Briscoe*, 460 U.S. at 345 (absolute immunity "bars one possible avenue of redress").

The reason absolute immunity is recognized is because the broader public interest outweighs the individual's interest. Public policy demands that a person who performs a certain function, whether as a witness or a judge or a prosecutor, must be able to conduct himself without fear of personal liability. *Briscoe,* 460 U.S. at 333, 343-45; *Imbler*, 424 U.S. at 427-28. Although this may deprive some individuals of a civil remedy, there are other checks and balances in the judicial system. *Briscoe*, 460 U.S. at 340. Witnesses can be criminally prosecuted for perjury, prosecutors face sanctions against their bar licenses, and prosecutors and judges can be charged criminally for wilful deprivations of constitutional rights. *Imbler*, 424 U.S. at 429. This Court has already determined that nothing in the legislative history of 42 U.S.C. §1983 shows that Congress intended to provide a damages remedy against any witness, including police officers. *Briscoe*, 460 U.S. at 341.

Briscoe recognized that there was the possibility of unjust convictions if officers perjured themselves, but still held that law enforcement officers were absolutely

immune for their testimony. *Briscoe*, 460 U.S. at 345. Petitioner's question presented for review is one which this Court has already answered and does not call for this Court's discretionary review.

D. There Is No Question That Probable Cause Existed and That the Prosecutor Did Not Rely on the Alleged False Evidence in Deciding to Present the Question to the Grand Jury.

It is well established that probable cause is an essential element of the plaintiff's malicious prosecution claim. The Seventh Circuit correctly held that a plaintiff "alleging malicious prosecution under §1983 must create a genuine issue of material fact as to each element of this constitutional tort," including the essential element of probable cause (App. A4, A15). Petitioner cannot cure his failure to establish all elements necessary to establish his malicious prosecution claim by challenging the veracity of the officer's testimony or labeling it "false."

Unquestionably, lack of probable cause is an essential element of the petitioner's malicious prosecution claim brought under the Fourth Amendment, which on its face prohibits seizure of persons or things without "probable cause, supported by Oath or affirmation." U. S. CONST. amend. IV; *Kalina*, 522 U.S. at 129; W. Prosser, LAW OF TORTS, §119 at 835 (4th ed. 1971). The facts set out in the prosecutor's affidavit and the Seventh Circuit's decision establish there was not a lack of probable cause (App. A1-37).

There was a plethora of evidence from various witnesses developed by five different law enforcement agencies which established probable cause, *i.e.*, that the facts and circumstances within the official's knowledge and of which he had reasonably trustworthy information at the time were "sufficient to warrant a prudent man in believing" that petitioner had committed the murder. *Hunter v. Bryant*, 502 U.S. 244, 228 (1991). The prosecutor reviewed all the evidence, disregarded the petitioner's equivocal statement, and independently determined there was probable cause.

The premise of petitioner's argument is that his failure to establish probable cause, an essential element to his claim, is not fatal to his case as long as he contends that the officer lied. Regardless of how vehemently petitioner labels the evidence "false" or "fabricated," it has long been established by this Court that it is a plaintiff's burden to establish all of the essential elements to his case when faced with the motion for summary judgment. *Celotex, Inc. v. Catrett*, 477 U.S. 317, 324 (1986).

Petitioner attempts to create a conflict among the circuits by misstating the Seventh Circuit's holding to be that probable cause is a defense to a claim based on fabricated evidence (Pet. 5). The Seventh Circuit held that probable cause was an essential element of the petitioner's malicious prosecution claim (App. A4), and that because "Cervantes is unable to establish an essential element of his Illinois law claim and his §1983 claim based on the Fourth Amendment," the "district court correctly granted summary judgment" (App. A15).

In urging there is a conflict in the circuits, petitioner cites *Mastrioanni v. Bowers*, 160 F.3d 671 (11th Cir. 1998). However, the Eleventh Circuit *vacated* this opinion and, instead of affirming the district court's denial of immunity, it reversed. *Mastrioanni v. Bowers*, 173 F.3d 1363 (11th Cir. 1998). In *Mastrioanni*, the plaintiffs sued the prosecutors for knowing use of perjured testimony. 173 F.3d at 1365. The Eleventh Circuit held that the prosecutors were absolutely immune because the record did not show the prosecutors acted outside their prosecutorial functions. 173 F.3d at 1367. It also held that the law enforcement officers were absolutely immune for their testimony, and that they had qualified immunity for other actions which did not violate established constitutional rights. 173 F.3d at 1368. *Mastrioanni* does not address whether the bald assertion of false testimony means that a plaintiff does not have to establish all elements essential to his claim when faced with a summary judgment motion.

Petitioner's reliance on *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) is also misplaced (Pet. 5). *Anthony* does not address the question posed by petitioner, whether §1983 provides a remedy when there is alleged fabricated evidence (Pet. 5-6), but addresses the complaining witness exception (see §II, *infra*).

Finally, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123 (2d Cir. 1997) does not conflict with the Seventh Circuit's holding in this case. The Second Circuit in *Ricciuti*, like the Seventh Circuit in this case, recognized that establishing a lack of probable cause is an essential element to a malicious prosecution claim. *Ricciuti*, 124 F.3d at 130. Petitioner quotes from the Second Circuit's decision out of context, arguing that

creation of false information "is redressable in an action for damages under 42 U.S.C. §1983." This statement was made while discussing whether lack of probable cause for purposes of qualified immunity was a violation of a clearly established right or was it "legally irrelevant" to a Fourth Amendment unlawful arrest claim. *Ricciuti*, 124 F.3d at 130.

None of petitioner's cases present a true conflict to resolve.

II.

THERE IS NO "COMPLAINING WITNESS EXCEPTION" WHICH DEPRIVES A TESTIFYING WITNESS OF ABSOLUTE IMMUNITY

Petitioner cites to *Anthony v. Baker*, 955 F.2d 1395, 1401 (10th Cir. 1992), which holds that where a testifying witness is also a complaining witness, then the absolute immunity afforded to testifying witnesses is lost. This is known as the so-called "complaining witness exception." The Seventh Circuit did not decide this case based on this exception (App. A7-8), although the district court granted summary judgment on the basis that respondent was not a complaining witness. This question is thus before this Court.[2]

The first question is whether respondent was a complaining witness (who is liable only if he acted with malice and probable cause). As shown above, this is not supported by this record and the district court correctly

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[2] This issue is also raised in a conditional cross-petition for a writ of certiorari to preserve the issue for review in the event this Court accepts this case for review.

held that respondent was not a complaining witness (Pet.App. 18-30; §I(A), *supra*). The second question presented (assuming respondent was a complaining witness) is whether a complaining witness loses absolute immunity when he is subpoenaed to testify, and becomes liable for damages? Respondent submits there is no such exception to the absolute immunity accorded to testifying witnesses.

The "complaining witness exception" to the absolute immunity afforded to testifying witnesses has not been accepted by the Eleventh and Third Circuits. *Jones v. Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999); *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992). *Jones* properly applied this Court's functional approach. 174 F.3d. at 1282. Where the false statements were "the sole basis asserted for probable cause in the arrest affidavit," there was no immunity from liability arising from that action. *Jones,* 174 F.3d at 1285. However, where that officer also testified before a grand jury, at the criminal trial and during pre-trial depositions, even if the testimony were false, he is absolutely immune. *Id.* at 1286.

The Second Circuit has recognized such an exception. In *White v. Frank*, 855 F.2d 956 (2d Cir. 1988), two police officers were convicted of criminal official misconduct, and one officer admitted he committed perjury in front of a grand jury and at trial, resulting in the plaintiff's conviction. Plaintiff then sued the officers under 42 U.S.C. §1983. The Second Circuit held that because the officers had initiated a baseless prosecution, they were subject to suit. *Id.* at 959-60 (citing *Malley*, 475 U.S. at 340). *White* holds that if a person is involved in

the initiation of a suit, then he is subject to liability for all further actions in those proceedings, regardless of his other functions. *White* cannot be reconciled with the holding in *Briscoe* that testifying witnesses are absolutely immune, even if they commit perjury, and the sole recourse is criminal charges for perjury. 855 F.2d at 961.

The Ninth and Tenth Circuits have also recognized the "complaining witness exception." *Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997); *Anthony v. Baker*, 955 F.2d, 395, 1401 (10th Cir. 1992). The Seventh Circuit has discussed this exception without applying it (App. A6-7). *See, e.g., Curtis v. Bembenek*, 48 F.3d 281, 285-86 (7th Cir. 1995) (holding that where a malicious prosecution claim was not stated, plaintiff could not rely on a "complaining witness theory").

Since these decisions were decided (with the exception of *Jones v. Cannon*), this Court has decided *Kalina*, in which it held that a person may be absolutely immune for some functions, and not immune for others. Applying the functional approach, *Kalina* holds that the prosecutor was absolutely immune for actions taken "in connection with the preparation and filing of the two charging documents—the information and the motion for an arrest warrant." *Kalina*, 522 U.S. at 129. She was not immune when she signed an affidavit in support of the application for an arrest warrant which contained false statements because this is not the role of a prosecuting attorney. *Id.* at 129-30. *Kalina* stands for the proposition that acts taken in one function do not taint acts performed in another function and deprive a person of absolute immunity.

The question of whether there is a "complaining witness exception" to a testifying witness' absolute immunity is one which the lower courts have not had sufficient time to consider in light of this Court's decision in *Kalina*. Indeed, only one circuit has considered this exception since *Kalina*, and it determined there was no exception. *Jones*, 174 F.3d at 1287 n.10. There is no post-*Kalina* conflict among the circuits.

However, should this Court accept this case for review, two issues are raised in relation to complaining witnesses. First, is a law enforcement officer a complaining witness merely because he was one (of many) investigating officers and he was subpoenaed to testify? Second, is there a "complaining witness exception" which deprives a testifying witness of absolute immunity for his testimony?

As shown above, this record establishes that the respondent did not initiate or instigate the prosecution. While he was involved in the investigation, this did not make him the complaining witness under the common law understanding of this phrase. The term "complaining witness" is a misnomer because that person is not necessarily a witness, but is the person who initiates or instigates a criminal prosecution (App. 7). *Kalina*, 522 U.S. at 135 (Scalia, J., concurring). At common law, the complaining witness was the person who was victimized and who lodged a complaint with the authorities, commencing a criminal prosecution. *See, e.g., People v. Bernor*, 115 Mich. 692, 74 N.W. 184 (1898); *Schultz v. Huebner*, 108 Mich. 274, 66 N.W. 57 (1896) (drawing distinction between role played by complaining witness and police); *Cudahy v. Powell*, 35 Ill.App. 29 (1889).

A complaining witness was not subject to suit for malicious prosecution unless he acted with malice and in the absence of probable cause. *Kalina*, 522 U.S. at 127; *Malley*, 475 U.S. at 340-41. If there was probable cause, then the defendant's motive or malice was immaterial. *Wagner v. Aultman*, 2 Ill.App. 147, 150 (2d Dist. 1878). As shown above, here there was probable cause, and thus respondent could not be sued as a complaining witness, even if he had a bad motive. Moreover, respondent here was neither the victim, nor was he the person asking the prosecutor to bring charges. At common law, respondent would have been the authority with whom a complaining witness would have lodged his complaint.

That this respondent, as part of his official duties, participated in an investigation with five other law enforcement agencies, does not make him the "complaining witness." This record shows that the respondent wanted to continue the investigation, but the prosecutor decided not to seek a warrant for more physical evidence, but to take the information already developed during the investigation by five law enforcement agencies to the grand jury. True, respondent also was a testifying witness before the grand jury. But he was subpoenaed, and this record shows that he was one of multiple law enforcement officers who could have been subpoenaed to testify about the investigation, according to the prosecutor (App. A28-29). The prosecutor did not decide to subpoena respondent because he was the only one with information and who was instigating the prosecution. Rather, he selected the respondent because he was the most familiar with all aspects of the investigation (App. A28). Because the decision to

prosecute was the prosecutor's alone, the respondent did not instigate the proceeding and was not a complaining witness. *White*, 855 F.2d at 962 (citing RESTATEMENT (SECOND) OF TORTS, §653 comment g (1977). *See also* W. Prosser, LAW OF TORTS, §119 (4th ed. 1971).

If the respondent were held to be a complaining witness under these circumstances, then all law enforcement officers would be subject to a civil rights suit whenever a person is indicted, but not convicted, and the law enforcement officers both investigated the crime and testified at a judicial proceeding. This would mean that all officers would face personal liability whenever an accused is acquitted and accuses the officer of fabricating evidence. Labeling a police officer a "complaining witness" does not vitiate the absolute protection accorded to testifying witnesses. The functions of initiating a prosecution (which respondent did not do here) and testifying in a judicial proceeding are separate and distinct functions. Those circuits which have applied the "complaining witness exception" ignore this.

However, even if respondent were a complaining witness, this did not eviscerate his absolute immunity as a testifying witness before the grand jury. The district court correctly entered summary judgment in respondent's favor on this issue, and this Court should affirm on this alternative basis.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NANCY G. LISCHER
Counsel of Record
STEVEN M. PUISZIS
CHARLES H. WAHTOLA
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
312-704-3000

Attorneys for Respondent
Larry Jones

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